IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 844

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,

Petitioner,

against

FRANK DE FORTE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner
80 Centre Street
New York, N. Y. 10013

JAMES L. LEKIN
Attorney for Respondent
Liberty Bank Building
Buffalo, N. Y. 14202

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

INDEX TO APPENDIX

	PAGE
Order to Show Cause	1
Motion for Leave to Proceed in *Forma Pauperis*	3
Affidavit of Frank De Forte	4
Petition for a Writ of Habeas Corpus	6
Exhibit "A"	19
Exhibit "B"	20
Exhibit "C"	21
Exhibit "D"	22
Opinion of District Court	23
Opinion of United States Court of Appeals	30
Order of Reversal	45
Petition for Rehearing In Banc	47
Judgment	48
Letter of Respondent's Counsel to Hon. Irving R. Kaufman	50
Letter of District Attorney, Nassau County, to Hon. Sterry Waterman	55

Order to Show Cause.

United States District Court

FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel FRANK DE FORTE,

Relator,

against

VINCENT R. MANCUSI, as Warden of Attica Prison, Attica, N. Y.,

Respondent.

Upon the verified Petition, the Exhibits attached thereto of Frank DeForte, for the issuance of Writ of Habeas Corpus and sufficient reason appearing therefore, it is

ORDERED, that the Respondent, Vincent R. Mancusi, as Warden of Attica Prison show cause before this Court, at Room of the Courthouse, Federal Building, Rochester, New York, on the day of 1966 at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, why a Writ of Habeas Corpus should not issue herein as prayed for in said petition; and it is further

ORDERED, that the Relator be retained in custody within this district until further order of this Court; and it is further

ORDERED, that service of a copy of this order to show cause, together with a copy of the verified petition and Exhibits attached thereto on the Respondent Vincent R. Mancusi, as Warden of Attica Prison on or before the

day of 1966, or in the alternative, service of the copies of the aforesaid papers and documents on Louis J. Lefkowitz, Esq., Attorney General of the State of New York, and the District Attorney of Nassau County, State of New York, on or before the date hereinbefore set forth be deemed sufficient service.

Dated: New York, New York, March 24th, 1966.

.....,
United States District Judge.

Motion for Leave to Proceed in *Forma Pauperis*.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel FRANK DE FORTE,

Relator,

—*vs*—

VINCENT R. MANCUSI, as Warden of Attica Prison,
Attica, N. Y.,

Respondent.

Appellant, Frank De Forte, moves the court for an order permitting him to proceed in this Court in forma pauperis with his petition for a Writ of Habeas Corpus and appeal from the judgment of the Court of Appeals of the State of New York entered in this cause on December 6, 1962 and January 23, 1963 pursuant to the provisions of Title 28, U.S.C. Section 1915 and Rule 53 of the Rules of this Court and in support thereof attaches the annexed affidavit.

The petition of the relator herein for a Writ of Habeas Corpus is being filed with this motion and affidavit.

Dated: New York, March 24th, 1966.

/s/ FRANK DEFORTE,
Relator Pro Se.,
Box 149,
Attica, New York.

To:

HONORABLE LOUIS J. LEFKOWITZ,
80 Centre Street,
New York 13, New York.

DISTRICT COURT CLERK,
United States District Court,
Western District of New York,
Federal Building,
Rochester, New York.

JOHN O. HENDERSON.

Affidavit of Frank De Forte.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel FRANK DE FORTE,

Relator,

—*vs*—

VINCENT R. MANCUSI, as Warden of Attica Prison, Attica, N. Y.,

Respondent.

STATE OF NEW YORK }
COUNTY OF WYOMING } ss.:
TOWN OF ATTICA }

FRANK DE FORTE, being duly sworn deposes and says:

1. That he is the relator herein; that he is an American Citizen through birth and over the age of 21 and makes this affidavit in support of the application to proceed in forma pauperis.

2. That he was a defendant in a criminal case and was tried in the County Court, Nassau County, State of New York, and was convicted of conspiracy, extortion and coercion when he was sentenced to a term of 3 to 5 years and that he has been serving said sentence imposed on him from in or about January 1963.

3. That the trial of said relator took 3½ months with almost daily sessions with approximately 125 witnesses appearing and written exhibits numbering in excess of 100. That the stenographer's minutes of the record herein consist of approximately 6500 pages.

4. The relator in prosecuting the appeal herein to both the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York, and to the Court of Appeals of the State of New York, leave to the petitioner appellant herein was granted by each of the aforesaid Courts to permit said relator to appeal in forma pauperis.

5. That he is still without sufficient means and is a poor person well within the meaning of the law, unable to pay costs for filing the petition annexed hereto.

6. That a petition for a Writ of Habeas Corpus is being filed simultaneously with this motion and affidavit.

WHEREFORE, relator prays that he may have leave to proceed in this Court on a petition for a Writ of Habeas Corpus in forma pauperis.

FRANK DE FORTE,
Relator Pro. Se.,
Box 149,
Attica, New York.

Sworn to before me this
24th day of March, 1966.

s/ RALPH J. BOTTONE,
Notary Public.

Petition for a Writ of Habeas Corpus.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel FRANK DE FORTE,

Relator,

against

VINCENT R. MANCUSI, as Warden of Attica Prison, Attica, N. Y.,

Respondent.

To: THE HONORABLE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK:

The petition of Frank De Forte, respectfully shows:

1. The petitioner, Frank De Forte, makes application herein for a Writ of Habeas Corpus, in that he is unlawfully detained and restrained of his liberty by Vincent R. Mancusi and is now in the custody of Vincent R. Mancusi, as Warden of Attica Prison at Attica, New York, located within the District for which this Court sits.

2. The cause or pretext of such detention and restraint and the procedural history of the legal efforts by the relator herein to legally overcome such detention and restraint, are as follows:

Relator was an officer of a local Labor Union to wit, Local No. 266 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and was indicted, together with fourteen (14) others, in the County Court, Nassau County, State of New York, and

jointly tried on sixteen (16) counts of Extortion, Attempted Extortion, Conspiracy and Coercion, some of which counts were dismissed by the Trial Court, and others upon which he was acquitted by a jury finding.

Relator was found guilty by a jury of three (3) counts of the indictment, to wit: an alleged criminal conspiracy to monopolize the business of what is commonly known as "Juke Boxes and Game Machines" in violation of Section 340 of the New York General Business Law and of an alleged Extortion (New York Penal Law, Section 850) and Coercion (New York Penal Law, Section 530), on the same facts, in obtaining the sum of $80.95 from one Richard Hohman, as a consequence of his payment of an initiation fee, dues and assessments in said amount in joining and becoming a member of Local No. 266, the aforesaid Local Union of which the relator was an officer.

Relator was sentenced by the Court on June 21, 1960, on the Felony count of Extortion to a term of 3 to 5 years and relator is now in prison serving the term imposed as aforestated. A suspended sentence as to relator was imposed by the Court on the misdemeanor counts of Conspiracy and Coercion.

Relator appealed to the Appellate Division of the New York Supreme Court, Second Judicial Department and said Court unanimously affirmed the judgment of conviction. The opinion of said Court is reported at 16 A. D. 834; 228 N.Y.S. 2d 875, and a copyy thereof is annexed hereto as Exhibit "A".

Leave to appeal to the Court of Appeals of the State of New York was granted by a Judge thereof (Judge Fuld), and an appeal was thereupon taken by relator herein to said Court. The Court of Appeals by a four (4) to three (3) vote affirmed the judgment of the relator. The opinion of said Court is reported at 12 N. Y. 2d 812; 236 N.Y.S. 2d 63; 187 N. E. 2d 130, and a copy hereof is annexed as Exhibit "B".

Relator moved the Court of Appeals for reargument of his appeal and for an amendment of the remittitur, and said motion for reargument was denied and the motion for the amendment of the remittitur was granted. The opinion of said Court on said motions is reported at 12 N. Y. 2d 946; 238 N.Y.S. 2d 521, and a copy thereof is annexed hereto as Exhibit "C".

Relator thereupon petitioned the Supreme Court of the United States for a Writ of Certiorari to the Court of Appeals of the State of New York and by order dated October 14, 1963, the Supreme Court of the United States denied the petition for a Writ of Certiorari, with Mr. Justice Douglas being of the opinion that Certiorari should be granted (11 L. ed 2d 95).

Accordingly, petitioner exhausted all State remedies as required by 28 U.S.C. 2254.

In or about November, 1963, relator petitioned this Court (File #63 Civil 3357) for a Writ of Habeas Corpus on the ground that he had been denied the due process guaranteed him by Amendment Fourteen of the United States Constitution by the actions of the State Court Judge presiding at his trial in keeping a jury in deliberation for over twenty-four (24) consecutive hours without any sleep, respite or rest, after the jury had on two separate occasions during said period of deliberation advised the trial judge in writing that its members were fatigued, at an impasse, and required rest for clear thinking. The late Judge Dawson denied the petition for the writ of habeas corpus which was sought on the coercion of jury question alone and on appeal to the United States Circuit Court of Appeals for the Second Circuit the denial of the writ was affirmed. The opinion of this appellate court is reported at 335 F. 2d 173.

All of the appeals heretofore taken by relator have been taken in forma pauperis.

3. The relator is restrained and imprisoned pursuant to a sentence that is illegal and void in that relator was denied

his constiutional rights guaranteed by the Fourth and Fifth Amendments of the Constitution of the United States when evidence obtained as a result of an illegal search and seizure was offered by the prosecution in evidence at his trial, and over objections by relator's attorney, was admitted by the Trial Court. Further, evidence obtained through illegal wiretap was offered and admitted at the trial, although the trial judge had ruled said wiretap to be illegal and informed defense counsel that it would be excluded. The facts and circumstances under which the denial of the aforesaid constitutional rights arose are as follows:

The trial of relator was held in the County Court, Nassau County, before Hon. Paul J. Widlitz, then a County Judge, and a jury. Books and records of the Local Union of which relator was an officer were seized under the circumstances hereinafter set forth and were introduced in evidence at said trial. Relator contends that the manner in which those books and records were obtained by the prosecution was as a result of an illegal search and seizure in violation of the Constitution, that defense counsel objected to the admission thereof on the specific ground that the books and records were obtained through an illegal search and seizure, but they were nevertheless admitted in evidence.

The prosecution called as a witness a member of the Nassau County Police Department who was second in command of the District Attorney's Squad (4393-94)*, who testified that on May 13, 1959, he visited the offices of Local No. 266 together with two other members of the District Attorneys' Squad (4394). The offices of Local #266 were located in the County, City and State of New York (4450). Upon his arrival at said office, relator DeForte and co-defendant Zundel were present and objected to the removal

* Refers to pages of trial record.

of any books and records of the organization, and stated that the witness had no right to take same. Thus the witness testified (4409):

> Q. They indicated to you by word and substance and they meant that you had no authority to take those papers and they had no right to give them to you? Ans. Yes, sir.

Nevertheless, the prosecution witness at the aforesaid time and place removed from the premises of Local No. 266 all of the voluminous books and records of that local (4412-13).

At the time of the aforesaid search and seizure, admittedly the witness had no warrant or court order (4402), was unaccompanied by any New York City Police Officer or Sheriff (4450) and the apparent authority under which he was allegedly acting was a subpoena issued by the District Attorney, Nassau County, a photostatic copy of which is annexed hereto as Exhibit "D".

An examination of Exhibit "D" hereof indicated that it is a forthwith subpoena directing Local No. 266 to appear before the District Attorney, Nassau County and to produce at that time the various books and records enumerated therein.

Prior to the admission of the evidence seized as aforesaid, defense counsel for the within relator objected that the introduction thereof resulting from the illegal search and seizure would be violative of the constitutional rights of the relator (4396-97). The Trial Court, in permitting the introduction of the evidence thus obtained, stated (4402):

> "It is true the law says that the manner in which the evidence is obtained has no bearing upon the admissability of evidence otherwise competent."

Under the Code of Criminal Procedure of the State of New York (Section 607, 609, 610, 614 and 615-a), the authority of the District Attorney to issue a subpoena is limited to witnesses who are to appear before a Grand Jury and to those who are to appear at the trial in support of an indictment. The foregoing sections further provide that in the service of such subpoena, the peace officer must serve same in his county, city, town or village and that when a subpoena is to be served in another County, the District Attorney is empowered to send such subpoena to the Sheriff of the County in which said witness resides for service.

The New York State courts in interpreting the aforecited sections of the Code of Criminal Procedure have held as follows:

In re Atlas Lathing Corp., 176 Misc. 959, 29 NYS 2d 458, an Assistant Attorney General accompanied by a plain clothes policeman and an investigator appeared at a business office and under the cloak of a subpoena duces tecum demanded and acquired possession of all of the books, papers and documents of that corporation.

Under the above facts, the Court held that in the exercise of his statutory power the Attorney General may require the production of any books and papers which he deems relevant or material to an investigation but that such power, even if properly exercised, may not be invoked to imply a right of seizure; that the Attorney General had no authority to issue a subpoena requiring the "forthwith" production of records; since the papers were not seized as an incident of an arrest or during the execution of a lawful search warrant, the Court stated that there was a virtual raid upon the premises, without color or legal right that may not be condoned irrespective of the laudible zeal of public officials entrusted with the proper adminis-

tration of criminal justice. The Court then stated:

> ". . . that the forcible and compulsory extortion, seizure and retention of a man's private papers accomplished without the benefit of a proper legal process, should not be indirectly sanctioned by permitting evidence procured therefrom to be used as a basis upon which to predicate a criminal charge against him."

It has also been held that where a forhwith subpoena duces tecum to appear before a Grand Jury was served, that "a subpoena duces tecum confers no right to seize the property referred to in the subpoena • • •" (Amalgamated Union Local 224 v. Levine 219 NYS 2d 851).

In the instant case, the subpoena duces tecum (Exhibit "D") which was returnable forthwith was in fact merely an invitation to attend the office of the District Attorney, Nassau County. It was not to compel the attendance of a witness with books and records set forth either before a Grand Jury or at a trial. It is clear that the New York courts have held that there is no authority to issue a forthwith subpoena nor any authority to seize any records upon the service of such subpoena.

In the instant case, it is undisputed that at the time of the seizure of the books and records herein no arrest was made so that the State cannot claim the search and seizure was an incident to such arrest. It was affirmatively established by the testimony of the prosecution's own witness that at the time that he seized the books and records herein he had no search or other warrant nor any Court order and that his sole authority for his search and seizure was the subpoena duces tecum (Exhibit "D"), and that he was not acting within the territorial jurisdiction of Nassau County.

During the trial of the case at issue over one hundred written exhibits were introduced in evidence. The importance to the trial jury in its deiberation of the illegally seized books and records can best be appreciated by the fact that it made a specific request for the delivery to it of "the checks and books of 266 in evidence" and "Homans application in 266". Such request was made after the jury had been deliberating for approximately 18 hours. It is clear that this illegally seized evidence was of import in the jury deliberation.

It is respectfully submitted that by reason of the foregoing, the Constitutional rights guaranteed to relator by the Fourth Amendment were violated.

In the year 1960, the year of the trial of relator's case, the action of the trial court in admitting illegally seized evidence at the trial may be condoned because of the pre-Mapp evidentiary rule (Mapp v. Ohio, 367 U. S. 643), said prior rule being that the fruits of an illegal search and seizure although excluded as evidence in trial in Federal courts (Weeks v. United States, 232 U. S. 383) was not necessarily excluded in State court trials.

While the appeals in the instant case were pending and being heard in the New York State courts, the United States Supreme Court in Mapp held that the Weeks exclusionary rule would be thenceforward binding upon the individual states. In its opinion (Exhibit "A",) on the appeal to it in the instant case, the New York State Appellate Division, Second Judicial Department while tacitly admitting the truth of relator's claim that the search and seizure of the books and records of Local No. 266 was unlawful, reasoned that these relators had no standing to complain because the Union records seized were not "private, personal papers." That Court erred in reasoning that only private personal papers were within the scope of the exclusionary rule. In Jones v. United

States, (362 U. S. 257, 1960), Mr. Justice Frankfurter stated that "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him."

Relator's lawful use of the property, i.e. the union office that was the scene of the unlawful search and seizure is unquestioned. The premises were legally leased from the owner of the building for the conduct of a union office. Relator was a union officer legally in the union office. As aforesaid, no arrest was made at the time of the search and seizure.

Further, there was no probable cause within the knowledge of the District Attorney, Nassau County to cause him to make the search. There were no charges pending at the time of the search, that required buttressing evidence. The charges later filed against relator were entirely conceived and based upon the contents of the illegally seized evidence. The search was completely general and exploratory. It was a flagrant abuse of the power of his office by the District Attorney, Nassau County.

The relator has never been able to gain access to the records taken for any reason whatsoever. The relator De Forte when faced with Federal prosecution, which charges, in so far as said relator is aware, are still pending for non-compliance of provisions of both the Internal Revenue Act and the Landrum-Griffin Labor Act. Upon threats of imprisonment by authorities of both Federal agencies, relator De Forte asked and urged the District Attorney, Nassau County to permit him access to certain papers required to comply with said provisions, but said requests were repeatedly denied even though said relator stated that such denial prevented him from complying with the laws enforced by those agencies and that he might there-

fore be charged with Federal offenses. Relator De Forte was threatened with imprisonment continuously although he made vigorous efforts to obtain the information needed from the records held by the District Attorney and it was not until said relator commenced service of the prison term imposed in the instant case that his harrassment came to an end. Due to this unlawful and illegal practice of the District Attorney, relator De Forte has a dim outlook as to what will transpire upon his completion of the imposed term and his release.

Further, the Local Union was put out of business by the illegal search and seizure. Every scrap and shred of the Local's records were confiscated by the District Attorney and even access to the records of the local union's membership list so as to advise the membership of what had transpired was refused. It must also be pointed out that at no time was the relator or brother officers charged with misappropriation or embezzlement of union funds.

The arbitrary abuse of power by the District Attorney resulting in the deprivation and violation of the Constitutional rights of the relator should not be permitted to stand.

At the time of the hearing on the within application, relator will submit to the Court a memorandum of law detailing the applicable law, passing reference to which has heretofore been made in this petition.

4. The District Attorney, Nassau County in the prosecution of the instant case further violated the Constitutional rights secured by the Fourth and Fifth Amendments by use of wire tap evidence.

The vintage of the wiretap evidence admitted at the trial herein was dated well prior to the commencement of the Nassau County investigation that resulted in the con-

victions herein of realtor. The dates of the wiretap transcripts coincided with the approximate period of time during which the Local Union was being investigated by the McClellan Committee and the Federal Bureau of Investigation. There were no charges of any wrong doing that were brought forward by either of these two bodies upon completion of said investigations.

The Court is respectfully requested to consider the following facts in substantiation of relator's aforesaid allegations, for obviously relator does not have personal knowledge:

1) A comparison of the dates of the transcripts with the dates of the investigation of the Local Union by the Nassau County authorities;

2) No Court order authorizing the questioned wiretap evidence as required by New York State Law was ever produced at relator's trial; and

3) The dates of the transcript *do* coincide with the approximate dates of the Federal investigations of relator's Local Union.

If the wiretap evidence was a product of a Federal investigation, the evidence would be clearly barred from use in a State proceeding (Schwartz v. Texas, 344 U. S. 199). And since there has been no showing by the State of New York that the wiretap evidence was obtained in compliance with the New York State Law, to wit, Code of Criminal Procedure, Sections 813-a, 813-b, an evidentiary hearing is required in accordance with Townsend v. Sain, 372 U. S. 293, to establish the validity of such evidence.

The wiretap question here presented was not thoroughly explored during the trial because of the prejudicial conduct of the trial judge. When the wiretap evidence was

first introduced, defense counsel moved to surpress same. The trial judge recessed the trial for a few days to deliberate the question. He then ruled that said wiretap evidence, so obtained, was against the laws of our land, that the trial court would be a participant in a federal crime if he allowed the evidence to be admitted, that it would not be used and that the defense need not prepare a defense against the suppressed evidence.

Subsequently, the prosecutor introduced the suppressed evidence, from transcripts, in question answer form, despite the Court's earlier ruling, overruling defense counsel's objection to the evidence, with the prosecutor admitting that he was using the fruits of wiretap. The evidence thus submitted was illegal, and the Court's reversal of its ruling without warning to defense, emasculated the defense.

Wiretap evidence introduced herein was illegal, was an invasion of the rights of privacy of a citizen, and was obtained and introduced in violation of the clear mandate of the Constitution.

Relator will submit a memorandum of law on this point as well.

5. By reason of the foregoing, the relator herein submits that he was deprived of his liberty as a result of an illegal search and seizure and the illegal use of wiretap evidence at his trial in violation of his constitutional rights as guaranteed under the Fourth and Fifth Amendments.

It is therefore respectfully submitted that a hearing be held by this Court to determine the validity of all the evidence used at relator's trial.

6. No other application for these Writs has heretofore been made to any other Court or Judge, except that an application was made as set forth on page 3 of this petition on the ground of coercion of the jury by the trial court.

Petition for a Writ of Habeas Corpus.

WHEREFORE, the relator Frank DeForte prays that a Writ of Habeas Corpus issue herein directed to Vincent R. Mancusi, as Warden of Attica Prison, commanding him to produce the body of relator Frank DeForte before this Court at a time and place to be specified in said Writ to the end that this Court may inquire into the cause of the detention of relator and that relator herein be ordered discharged from the detention and restraint aforesaid.

Dated: Attica, New York, March 24th, 1966.

Respectfully submitted,

FRANK DEFORTE,
Relator—pro se.
Box 149,
Attica, New York.

Subscribed and sworn to before me
the day of March 24, 1966.

s/ RALPH J. BOTTONE,
Notary Public.

Exhibit "A".

Supreme Court, Appellate Division,

Second Judicial Department.

People & C. res. v. Joseph DeGrandis, Frank Deforte and Ernest Zundel, def. ap. (and others, def)—Appeal by each of the three named defendants (DeGrandis, DeForte and Zundel) from a judgment of the County Court, Nassau County, entered June 21, 1960, after a jury trial, convicting him of (a) conspiracy to violate section 340 of the General Business Law (Penal Law, sec. 580, Subd. 1); (b) coercion (Penal Law, sec. 530); and (c) extortion (Penal Law, secs. 850, 851), and imposing sentence. As to each defendant, judgment affirmed. Defendants cannot invoke the Fourth Amendment to the United States Constitution with respect to the union records which were received in evidence. Such records were not the defendant's private, personal papers; they were the property of the union. Whatever possession the defendants had of these records were merely in their capacity as representatives of the union, and not in their private or individual capacity (U. S. v. White, 322 U. S. 694; see, also Mapp v. Ohio, 367 U. S. 643, 646-657, 661-665; and Davis v. U. S., 328 U. S. 582, 587, as to the interrelationship between the Fourth and Fifth Amendments, U. S. Const.). We have examined all the other contentions made by the appellants and find them to be untenable.

Exhibit "B".

Court of Appeals
December 6, 1962

"401. People etc. res. v. Joseph DeGrandis, ap.—

Judgments affirmed. No opinion. All concur except Desmond, Ch. J. Fuld and Proessel, JJ., who dissent and vote reverse and to order a new trial upon the ground that keeping the jury in deliberation for over twenty-four consecutive hours without any respite and after they had advised the Court of their fatigue on more than one occasion, constitutes coercion of the jury as matter of law."

Exhibit "C".

Motions DECISION COURT OF APPEALS JANUARY 23, 1963

2 Mo. No. 64

The People &c.,

Respondents,

vs.

Joseph DeGrandis, Frank DeForte and Ernest Zundel,

Appellants.

Motion for reargument denied. Motion for amendment of the remittitur granted, the return of the remittitur requested and, when returned, it will be amended to read, as follows: Upon the appeal herein there was presented and necessarily passed upon the contention of the defend ants that they were denied due process of law under the Fourteenth Amendment of the Constitution of the United States on the ground that the jury had been coerced into a verdict. In respect to this contention, the Court of Appeals held that there was no such denial. Defendants further contended that evidence obtained from union books and records as a result of an alleged illegal search and seizure was in violation of the Fourth and Fifth Amendments of the Constitution. In respect to this contention, the Court of Appeals held that there were no violations of any individual rights guaranteed to the defendants by the Constitution.

Exhibit "D".

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK

To Local 266, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 55 W. 42nd St., New York, N. Y. ..... Greetings:

YOU ARE COMMANDED to appear before the DISTRICT ATTORNEY of the County of Nassau, at the County Court House, in Mineola, in Nassau County, on FORTHWITH as a witness in a criminal action prosecuted by the People of the State of New York against JOHN DOE and that you bring with you and produce, at that time and place aforesaid, the following:

Charter, Constitution, By-Laws Amendments, all Union Contracts, Membership Lists, Receipt Books. Petty Cash Vouchers, Check Books, Check Stubs, Cancelled Checks, Minute Books, Welfare Records, Insurance Policies and any and all other Union records under in connection with Local 266

and for a failure to attend you will be deemed guilty of a Criminal Contempt of Court, and liable to a fine of Two Hundred and Fifty Dollars and imprisonment for thirty days and be punished for a misdemeanor.

Dated at Mineola, in the County of Nassau, the 13th day of May, 1959.

/s/ Manuel W. Levine
MANUEL W. LEVINE
District Attorney of Nassau County

Bring this Subpoena with you and report
at the District Attorney's Office

Opinion of District Court.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CIVIL 11812

UNITED STATES OF AMERICA ex rel, FRANK DEFORTE,
Relator,

vs.

VINCENT R. MANCUSI, Warden of Attica State Prison,
Respondent.

Relator, co-defendants Joseph DeGrandis and Ernest Zundel, all officers of Local 266 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and twelve other defendants were indicted in Nassau County, New York, for conspiracy (Penal Law § 580), coercion (Penal Law § 530) and extortion (Penal Law §§ 850, 851). The indictment involved alleged monopolization of the juke box industry in metropolitan New York City. Trial was held in the Nassau County Court, and the jury found defendants DeForte, DeGrandis and Zundel guilty, but acquitted the remaining defendants. Subsequently the relator was sentenced to from three to five years' imprisonment. He is presently serving that sentence in Attica State Prison.

Appeals by the relator to the Appellate Division of the Supreme Court[1] and to the New York Court of Appeals[2]

---

[1] *People* v. *DeGrandis*, 16 A. D. 2d 834, 228 N.Y.S. 2d 875 (2d Dep't 1962).

[2] *People* v. *DeGrandis*, 12 N. Y. 2d 812 (1962).

were unsuccessful, and certiorari to the United States Supreme Court was denied.[3] A previous application for a writ of habeas corpus, on other grounds, was denied and that denial affirmed on appeal.[4] It appeals that the relator, with respect to the present issues, has exhausted his available state remedies as required by Title 28 U.S.C. § 2254.

Relator's petition contains two claims (1) that evidence was received against him in the course of trial which had been seized in violation of his Fourth Amendment rights, and (2) that illegal wire-tap evidence was also improperly received. The second claim has been withdrawn. Involved in the first claim is the manner in which certain books and records of Local 266 were obtained.

It appears that these books and records were secured through the issuance, by the District Attorney's office, of a "forthwith" subpoena duces tecum addressed to Local 266.[5] The Local apparently did not surrender its books and records upon service of the subpoena but, without the consent of its officers, the books and records were taken by those serving the subpoena. The Assistant District Attorney, who has appeared in opposition to this application, has not attempted to justify this use of the subpoena.

Initially, the relator concedes that he, as a union officer, can claim no Fifth Amendment privilege with respect to the production of union records. See *United States* v. *White*, 322 U. S. 694 (1944). He notes, however, that the Supreme Court decided *Mapp* v. *Ohio*, 367 U. S. 643 (1961) before his conviction became final and, accordingly, that

---

[3] *De Grandis, et al.* v. *New York*, 375 U. S. 868 (1963).

[4] *DeGrandis* v. *Fay*, 335 F. 2d 173 (2d Cir. 1963).

[5] As to the propriety of a "forthwith" subpoena under New York law, see *Amalgamated Union, Local 224* v. *Levene*, 31 Misc. 2d 416, 219 N.Y.S. 2d 851 (Sup. Ct. 1961) and *In re Atlas Lathing Corp.*, 176 Misc. 959, 29 N.Y.S. 2d 458 (Sup. Ct 1941).

the Fourth Amendment's proscription against unreasonable searches and seizures would apply to his state court trial. See *Linkletter* v. *Walker*, 381 U. S. 618 (1965). Under *Jones* v. *United States*, 362 U. S. 257 (1960), particularly as that decision is interpreted by the Fifth Circuit Court of Appeals in *Henzel* v. *United States*, 296 F. 2d 650 (1961),[6] relator claims that he, as an individual, has standing to challenge the seizure and use of the aforementioned union records in his state court trial.

In *Jones, supra*, the Supreme Court reviewed a narcotics conviction in which the defendant had been denied standing to move to suppress because he neither claimed ownership of the seized articles nor claimed a greater interest in the searched premises than that of an invitee or guest. Speaking in the context of Rule 41(e) of the Federal Rules of Criminal Procedure, the Court, at page 261, observed initially that:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41(e) applies the general principle that a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitutional protection is given.'"

The Court went on to point out that:

> "The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy."

---

[6] See also: *United States* v. *Birrell*, 242 F. Supp. 191, 198-201 (D.C.S.D.N.Y. 1965).

The Court then concluded that:

> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."

However, upon reviewing the tests which the lower federal courts had applied to determine if an individual had demonstrated that he possessed the requisite interest, the Court found those tests to be deficient. In effect, those tests had pinioned a defendant, either requiring that he risk loss of his Fifth Amendment rights or, in saving his defense, encouraging that he perjure himself in order to establish his standing to assert his Fourth Amendment rights.

Finding this dilemma presupposed ". . . requirements of 'standing' we do not find compelling," the Court found that two separate lines of thought effectively sustained Jones' claim of standing. The Court, at page 263, held that where:

> "The same element in this prosecution which has caused a dilemma, i.e., that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged."

Secondly, and here speaking more generally, the Court, at page 267, held:

> ". . . that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him."

In those cases where a Fourth and Fifth Amendment dilemma could occur, i.e., generally those cases involving contraband, the fruits or instrumentalities of a crime and resulting Fifth Amendment problems, the wisdom and fairness of the new guidelines are immediately apparent. Equally apparent, however, is the absence of any such dilemma when corporate or union books and records are involved. See *Wilson* v. *United States,* 221 U. S. 361 (1911) and *United States* v. *White, supra.*

Although no such dilemma was involved, in *Henzel* v. *United States, supra,* the Fifth Circuit Court of Appeals applying and relying upon Jones, concluded that the sole stockholder and president of a corporation, absent when his corporation's records were illegally seized, had standing to challenge the seizure. This result, and the Circuit Court's comment that the corporation's president "had an interest in the property at least as deserving of protection as the interest of the defendant Jones,"[7] in this court's view cannot be reconciled with existing precedents.

Not only do Henzel's holding and the aforementioned comment overlook the absence of the Fourth and Fifth Amendment dilemma to which the Jones' guidelines apply, but its holding and comment ignore the personal nature of Fourth Amendment rights. See *Hale* v. *Henkel,* 201 U. S. 43, 74-77 (1906); *Wilson* v. *United States,* 221 U. S. 361, 374-386 (1911); *Essgee Co.* v. *United States,* 262 U. S. 147, 155-158 (1923); *Mapp* v. *Ohio,* 367 U. S. 643, 655-657 (1961); *Wong Sun* v. *United States,* 371 U. S. 471, 492 (1963); *United States* v. *DeVasto,* 52 F. 2d 26, 29 (2d Cir. 1931); *United States* v. *Antonelli Fireworks Co.,* 155 F. 2d 631, 636 (2d Cir. 1946); *Lagow* v. *United States,* 159 F. 2d 245, 246 (2d Cir. 1946); *United States* v. *Guterma,* 272 F. 2d 344, 346 (2d Cir. 1959); *United States* v. *Fago,* 319

---

[7] *Henzel* v. *United States,* 296 F. 2d 650, 653 (5th Cir. 1961).

F. 2d 791, 792-793 (2d Cir. 1963). That Jones' "on the premises" test is singularly inappropriate when applied to corporate books and records would appear to require little discussion.[8] Envision, for example, a case in which the corporation's janitor was present during an illegal search and seizure but the corporation's vice-president was not.

Accordingly, the court joins in the view of the Third Circuit Court of Appeals in *United States* v. *Grosso,* 358 F. 2d 154, 160-161 (3rd Cir. 1966), to the effect that the Supreme Court, in Jones, confirmed the general rule as to standing and created an exception applicable only to a limited class of cases. Specifically, for the reasons heretofore stated, the court concludes that those cases involving corporate or union books and records do not fall within that class of cases governed by Jones.

The court is convinced, therefore, that *United States* v. *Antonelli Fireworks Co.,* 155 F. 2d 631 (2d Cir. 1946); *Lagow* v. *United States,* 159 F. 2d 245 (2d Cir. 1946); *United States* v. *Guterma,* 272 F. 2d 344 (2d Cir. 1959) and *United States* v. *Fago,* 319 F. 2d 791 (2d Cir. 1963) are controlling authority and, accordingly, finds the relator lacks standing to raise the present objection. The writ is dismissed.

In view of the recent authority contrary to this court's holding, a certificate of probable cause for appeal is granted.

Permission to appeal in forma pauperis is denied with the qualification that the relator may file with the Clerk of the United States District Court, United States Court-

---

[8] The court recognizes, however, that the Supreme Court, in the exercise of its supervisory power over the federal courts, may have reached the same result as did the Fifth Circuit Court of Appeals in Henzel. See *Ker* v. *California,* 374 U. S. 23, 31 (1963); see generally *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920).

house, Buffalo, New York, a notice of appeal without the payment of filing fees.

This denial does not prevent the relator from applying directly to the Court of Appeals for the Second Circuit, United States Courthouse, Foley Square, New York City, for permission to prosecute an appeal in forma pauperis.

So ordered.

Assigned counsel James L. Lekin has devoted much time to this matter with skill and diligence.

/s/ John O. Henderson
JOHN O. HENDERSON
United States District Judge

Dated: November 16th, 1966.

Opinion of United States Court of Appeals.

UNITED STATES COURT OF APPEALS

No. 478—September Term, 1966.

(Argued June 1, 1967 Decided June 28, 1967.)

Docket No. 31112

UNITED STATES OF AMERICA *ex rel.* FRANK DEFORTE,

Appellant,

—v.—

VINCENT R. MANCUSI, Warden of Attica Prison, Attica, New York,

Appellee.

Before:

WATERMAN, SMITH and KAUFMAN,

Circuit Judges.

KAUFMAN, *Circuit Judge:*

The sole issue presented by this appeal is whether the appellant, Frank DeForte, a vice-president of Local 266 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, had "standing" to object to the use against him in a criminal prosecution of

various union books and records that admittedly were illegally seized from the union's office by state officials, over the appellant's protests.

I.

The parties have stipulated to the essential facts which are relatively simple. DeForte, Joseph DeGrandis, and Ernest Zundel, all officers of Local 266, were indicted in Nassau County for conspiracy (N. Y. Penal Law § 580), coercion (N. Y. Penal Law § 530) and extortion (Penal Law §§ 850, 851) in connection with an alleged monopolization of the juke box industry in the New York City metropolitan area. They were charged with organizing the owners of music machines and juke boxes, and exacting tribute from them in the form of what appeared to be legitimate initiation fees, dues and monthly assessments. Prior to trial, the District Attorney's Office of Nassau County issued a subpoena *duces tecum* commanding the local to produce certain books and records. When the union refused to surrender these materials, the state officials who served the subpoena seized the books and records over the protests of DeForte, who was present at the time in the union's office.[1] The search and seizure were conducted despite the absence of a search warrant, and the state has never attempted to justify the behavior of its officials. Indeed, it has admitted the illegality of their acts.

The illegal search produced significant and substantial evidence. The books and records seized consisted, in the main, of the union charter, minutes of Local 266 meetings, the local's bank book, and cancelled checks and stubs. Also taken were applications to join the union by the

[1] We understand that the union's office was one large room in which defendant, as well as others, had their desks.

officers and other prospective members of the local. Appellant, we are told without denial, played a considerable role in the preparation of these materials. Thus, for example, all checks seized were signed by him together with two other officers; he procured and processed the applications of various members; and he made a substantial number of entries in the local's check book, ledger and records. Moreover, it is conceded that appellant was in possession and/or control of the books and records when they were seized from the union's office. That these records were not of little importance to the state's case is revealed by its admission that "most of the books and records of Local 266 which were seized were introduced into evidence."

The trial of appellant and his co-defendants resulted in the conviction of DeForte, DeGrandis and Zundel, and the acquittal of 12 other defendants named in the indictment. Appellant was subsequently sentenced to a term of from 3 to 5 years in prison. Following his conviction, DeForte appealed to the Appellate Division of the Supreme Court, Second Department, and thereafter to the New York Court of Appeals, alleging, among other points, that the search of the union's office and the seizure of its books and records were illegal, and accordingly the evidence should not have been admitted against him at trial. Both appellate courts affirmed the conviction on the ground that he lacked standing to raise this issue because the books and records were not his personal or private papers, but rather were the property of the union. *People* v. *DeGrandis*, 16 A. D. 2d 834, 228 N. Y. S. 2d 875, *aff'd* 12 N. Y. 2d 812, 236 N. Y. S. 2d 63 (1962). Certiorari to the United States Supreme Court was subsequently denied 375 U. S. 868 (1963).

Having exhausted his state remedies, appellant applied for a federal writ of habeas corpus on an alleged "coercion

of the jury'' claim. His application was denied, and that denial was affirmed by this Court.[2] DeForte then filed a second application in the District Court alleging first, that the books and records used against him during the trial had been seized in violation of his Fourth Amendment rights, and second, that illegal wiretap evidence also had been improperly admitted. The latter claim was withdrawn, while the former was never considered on the merits because Judge Henderson's denial was grounded on his belief that DeForte lacked standing to raise this objection. It is from this denial that he appeals.[3]

II.

The quest for a clear solution to the perplexing query as to who may challenge an allegedly unlawful search and seizure has been confounded by thorny problems. For nearly 50 years we followed the precept that while evidence secured by federal officers as the result of an illegal search and seizure could not be used in a federal prosecution, *Weeks* v. *U. S.*, 232 U. S. 383 (1914), not all defendants had standing to challenge this evidence. Then, in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), we were told that the Fourth Amendment right to privacy was guaranteed against state invasion by the Fourteenth Amendment and

---

[2] In his first application, DeForte alleged that he was denied due process because the judge, after delivering 3½ hour charge, kept the jury in deliberations for 24 consecutive hours, although the jury twice advised the court of its fatigue. *DeGrandis* v. *Fay*, 335 F. 2d 173 (2d Cir. 1964). (In the state Court of Appeals, Desmond, *C. J.*, Fuld and Froessel dissented from the affirmance and voted to reverse because they were of the view that this constituted "coercion of the jury as matter of law.")

[3] The District Judge, recognizing that there was recent authority contrary to his holding, granted a certificate of probable cause.

had to be enforced by the same exclusionary rule found in the federal courts.[4] Thus, the states were confronted with this same "standing" problem, and were compelled to apply the rules that had been developed in the federal courts in determining this question. See *U. S. ex rel. Coffey* v. *Fay*, 344 F. 2d 625, 628 (2d Cir. 1965).

In the pre-*Mapp* era, the federal rule seemed to be that in order to have standing to challenge the legality of evidence allegedly obtained in violation of the Fourth Amendment, a defendant must "claim either to have owned or possesed the seized property or to have had a substantial possessory interest in the premises searched." *Jones* v. *U. S.*, 362 U. S. 257, 261 (1960). See generally R. Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. U. L. Rev. 471-86 (1952). But, some relaxation of this quite stringent standard seemed to be in the making even prior to *Jones*. In *McDonald* v. *U. S.*, 335 U. S. 451, 456 (1948), the Supreme Court held that a defendant had standing to suppress evidence that had been illegally taken from a co-defendant, who had moved successfully to suppress, because "if the property had been returned [to the co-defendant] . . . it would not have been available for use at the trial." But see *Wong Sun* v. *U. S.*, 371 U. S. 471 (1963). And in *U. S.* v. *Jeffers*, 342 U. S. 48 (1951), the Court ruled that a defendant who had stored narcotics in

---

[4] The exclusionary rule of *Mapp* applied to state court convictions that had not become "final" before that decision was rendered. *Linkletter* v. *Walper*, 381 U. S. 618 (1965). Finality in this context means "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before [the] decision in *Mapp* v. *Ohio*." 381 U. S. at 622 n. 5. DeForte's petition for a writ of certiorari was not denied until October 1963, after *Mapp* was decided. He was entitled, therefore, to the benefits of the exclusionary rule if he had standing to challenge the legality of the search and seizure.

a hotel room rented by his two aunts, and to which he had been given the key, had standing to object to an unlawful search and seizure in the aunts' room. The Court added that "to hold that this search and seizure were lawful as to the respondent [because the search did not invade his privacy] would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right." *Id.* at 52. But it was not until *Jones* v. *U. S., supra,* that the Supreme Court attempted to articulate some standards to guide the courts in this difficult area. A careful examination of that case is therefore essential to a proper resolution of the issues now before us.

III.

Jones was arrested by police officers who possessed a warrant to search for narcotics in an apartment belonging to Evans, his friend. Evans had given Jones the use of the apartment, and a key with which he admitted himself on the day of the arrest. Though his home was elsewhere, Jones had a shirt and suit at the apartment, and had slept there "maybe a night." 362 U. S. at 259.

Prior to trial, Jones moved to suppress the narcotics and paraphernalia seized by the officers, claiming that their warrant had been issued without a showing of probable cause. The government challenged defendant's standing to raise this issue on the ground that he failed to allege "ownership" of the seized goods, or an interest in the searched premises greater than that of an "invitee or guest." The District Court and the Court of Appeals adopted this argument which permitted the receipt in evidence of the seized material.

The issue squarely presented to the Supreme Court was whether Jones was a "person aggrieved" within the mean-

ing of Rule 41(e) of the Federal Rules of Criminal Procedure,[5] and accordingly had standing to make a motion to suppress pursuant to that rule. Speaking for a unanimous Court,[6] Justice Frankfurter observed that:

> In order to qualify as a "person aggrieved by an unlawful search and seizure" *one must have been a victim of a search or seizure, one against whom the search was directed,* as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41(e) applies the general principle that a party will not be heard to claim a constitutional protection unless he "belongs to the class for whose sake the constitiutional protection is given." Hatch v. Reardon, 204 U. S. 152, 160. . . .
>
> Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search

---

[5] Rule 41(e) provides in part:

> A person aggrieved by an unlawful searc and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. . . .

As this Court has previously noted, in an opinion by Judge Waterman, "because the rule is . . . rooted in basic constitutional principle, the same test presumably governs standing to suppress evidence in a state prosecution." *U. S. ex rel. Coffey* v. *Fay,* 344 F. 2d at 628.

[6] Mr. Justice Douglas, though concurring in the Court's resolution of the issue of standing, dissented from the majority's finding that there was probable cause for the issuance of the warrant. 362 U. S. at 273.

as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, *that he himself was the victim of an invasion of privacy.*

362 U. S. at 261. (Emphasis added.)

But, Justice Franfurter went on to note that prosecution for certain crimes of possession posed a dilemma. He reasoned that if, in order to establish standing to suppress illegally seized evidence, a defendant were required to allege ownership of the seized contraband or an interest in the premises where it was found, these very allegations might later be used at the trial to establish his guilt. Moreover, if a defendant alleged possession for purposes of establishing standing, and later denied this at trial, he would be faced with a perjury charge.

In order to eschew this quandary, the Court found that "*two separate lines of thought* effectively sustain defendant's standing in this case." 362 U. S. at 263. (Emphasis added.) First, when possession is sufficient to convict a defendant of the crime charged, he need not show an interest in the premises searched or in the property seized in order to have standing to move for suppression. And second, "even were this not a prosecution turning on illicit possession, the legally requisite interest in the premises was here satisfied for it need not be as extensive a property interest as was required by the courts below." *Ibid.*

In connection with the second ground, the Court rejected the technical distinctions which lower courts had borrowed from the law of property and had applied to the issue of standing.[7] Such distinctions were inconsistent with the

---

[7] "While this Court has never passed upon the interest in the searched premises necessary to maintain a motion to suppress, the

(Footnote continued on following page)

protections guaranteed to those charged with crimes. Moreover, "no just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that *anyone legitimately on the premises when a search occurs* may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." 362 U. S. at 267. (Emphasis added.)

Thus, *Jones* dramatically liberalized the standing requirement for challenging the legality of searches and seizures. But while the case informs us as to what is *not* required to confer standing, the Supreme Court has avoided formulating, and perhaps deliberately, any specific rules for determining what *is* required. The Court apparently recognized that sweeping legal pronouncements which are meaningful are difficult to articulate because the individual's right to privacy in the particular case often conflicts with and must be balanced against society's need for

---

(Footnote continued from preceding page)

Government's argument closely follows the prevailing view in the lower courts. They have denied standing to 'guests' and 'invitees' [citing cases] and employees, who though in 'control' or 'occupancy' lacked 'possession [citing cases]. The necessary quantum of interest has been distinguished as being, variously, ownership in or right to possession of the premises' [citing case], the interest of a 'lessee or licensee' [citing case], or of one with 'dominion' [citing cases]. We do not lightly depart from this course of decisions by the lower courts. We are persuaded, however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. Even in the area from which they derive, due consideration has led to the discarding of these distinctions in the homeland of the common law. See Occupiers' Liability Act, 1957, 5 and 6 Eliz. 2, c. 31, carrying out Law Reform Committee, Third Report, Cmd. 9305. Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards." 362 U. S. at 265-66.

efficient and vigorous police protection. It appears that a proper balance can be struck only on a "case-by-case basis." *See* v. *City of Seattle*, 35 U. S. L., Week 4522, 4524 (U. S. June 5, 1967).

IV.

With this background of the law's evolution on "standing," it is appropriate for us to re-examine the facts in this case. While the state insists that the search and seizure were conducted against Local 266, we would be blind to reality if we did not recognize that the action by the state officials was actually "directed" at DeForte. The allegedly improper activities which the state was attempting to curtail could be halted only by prosecuting DeForte and his fellow union officials. Little would have been gained by prosecuting or fining the union alone, or even driving it to extinction, for the guiding culprits would have remained free to conduct their illegal activities through a different proscenium. (Indeed, the union was not even indicted.) That the state recognized this actuality is clearly evidenced by its placing of "monitors" on the local's telephone in order to overhear conversations of the appellant and other individuals operating behind the union facade. In these circumstances we would be myopic not to recognize that appellant was "a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search and seizure directed at someone else." *Jones* v. *U. S.*, 362 U. S. at 261.[8] Com-

[8] In *U. S. ex rel. Coffey* v. *Fay*, *supra*, we held that where stolen jewels had been seized from Coffey's companion, Kingdom "Bill" DeNormand, at the time he and appellant were arrested in the latter's car, the search was "directed against" Coffey. 344 F. 2d at 628-29. In that case, however, the appellant was confronted with the dilemma discussed in *Jones*, since he was being prosecuted for possession of stolen property.

pare *U. S.* v. *Birrell*, 242 F. Supp. 191 (S. D. N. Y. 1965), *motion for reargument granted and decision affirmed*, 243 F. Supp. 36 (S. D. N. Y. 1965), with *U. S.* v. *Re*, 372 F. 2d 641 (2d Cir.), *cert. denied*, 35 U. S. L. Week, 3475 (1967).

But, in the circumstances present here, the admittedly illegal search was not only "directed" at appellant, it also invaded his right of privacy—the basic right the Fourth Amendment is designed to protect. See *Camara* v. *Municipal Court*, 35 U. S. L. Week 4517, 4518 (U. S. June 5, 1967); *Warden* v. *Hayden*, 35 U. S. L. Week 4493, 4495 (U. S. May 29, 1967). While much has been written on the Fourth Amendemnt's guaranty of the individual's right to be secure in his "home," it is now well established that the freedom from unreasonable searches and seizures extends to one's place of business as well. See *Berger* v. *N. Y.*, 35 U. S. L. Week 4649, 4655 (U. S. June 12, 1967); *Go-Bart Importing Co.* v. *U. S.*, 282 U. S. 344 (1931); *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385 (1920). "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See* v. *City of Seattle*, 35 U. S. L. Week at 4523.

It is undisputed that DeForte was actually present in the union's office at the time of the illegal search and seizure. This office also served as his place of business and in which he spent a considerable part of each day. It appears to us to have been a clear invasion of privacy for the state's officials to have descended upon what was the union's office *de jure*, but DeForte's office *de facto*, and without a warrant and over his vigorous protests to have seized books and records, a substantial portion of which he had prepared and which were in his custody. We do not believe that in these circumsmtances any just interest of the Government in the effective and rigorous enforcement of the criminal law is hampered by recognizing that one situated as DeForte may challenge the legality of a search. See *Jones* v.

U. S., 362 U. S. at 267. Accordingly, he had standing to move for the suppression of the fruit of the illegal search, and the use of these books and records against him at his trial requires that his conviction be set aside.[9]

V.

We note that the cases cited by the state as enunciating a different principle are inapposite or clearly distinguishable. In *U. S.* v. *Bozza*, 365 F. 2d 206 (2d Cir. 1966), for example, the appellants had abandoned possession of a stolen gun to Guzzo, one of the members of the burglary ring. None of the appellants claimed any legitimate interest in the weapon; nor had any of them been present in Guzzo's home when the allegedly illegal search occurred. In those circumstances we denied standing stating that "the values that the Fourth Amendment protects are sufficiently advanced by excluding the results of illegal searches and seizures at the behest of 'victims' *in the broad sense the Supreme Court has given that term* . . . ." *Id.* at 223. (Emphasis added.)

Similarly, in *U. S.* v. *Grannello*, 365 F. 2d 990 (2d Cir. 1966), the papers which appellants were attempting to suppress had not been seized from them; nor had they contributed in any way to their preparation. And in *U. S.* v. *Fago*, 319 F. 2d 791 (2d Cir.), *cert. denied*, 375 U. S. 906

---

[9] The state argues, and appellant readily concedes, that the union could have been compelled to submit its books and records pursuant to a subpoena, and that if these materials had been legally obtained, DeForte's Fifth Amendment right against self-incrimination would not have prevented this evidence from being used against him. See *U. S.* v. *White*, 322 U. S. 694 (1944); *Wilson* v. *U. S.*, 221 U. S. 361 (1911). But, just as a search cannot be justified by the potent evidence it produces, see e.g., *U. S. ex rel. Rogers* v. *Warden*, —— F. 2d —— (2d Cir., June , 1967), so too an unlawful search cannot be justified on the ground that the evidence seized might have been obtained by other and lawful means.

(1963), the corporate records in question had been *lawfully* obtained by the District Attorney of Erie County "for a purpose wholly unrelated to the subsequently initiated federal inquiry," *id.* at 792, and then were turned over to officials of the Internal Revenue Service.

The other cases relied upon by the state (*U. S.* v. *Guterma,* 272 F. 2d 344 (1969); *U. S.* v. *Antonelli Fireworks Co.,* 155 F. 2d 631, *cert. denied,* 329 U. S. 742 (1946); *U. S.* v. *DeVasto,* 52 F. 2d 26, *cert. denied,* 284 U. S. 678 (1931), were decided prior to *Jones,* and are, therefore, precedents of dubious value. More in point, we believe, is *Henzel* v. *U. S.,* 296 F. 2d 650 (5th Cir. 1961), which is in accord with our holding here.[10]

VI

Finally, we observe that our decision is consonant with the rationale of the exclusionary rule which is "to deter—

---

[10] Henzel was the sole shareholder and president of the Chemoil Corporation whose property was searched by a postal inspector without a warrant. The Court of Appeals concluded that it was not decisive of the suppression issue raised that "the property seized and the premises searched in this case were owned by a corporation rather than by an individual. Since a corporation has the same rights as a natural person to be free from illegal searches and seizures, Silverthorne Lumber Co. v. United States, 251 U. S. 385 . . . there is nothing in the corporate status . . . which would prevent appellant from attacking the unlawful search and seizure of the corporation's property." 296 F. 2d at 652. Altough Henzel was not present when the illegal search and seizure occurred, the court found that the search was "directed at" him. The fact that he had prepared much of the material seized and spent the greater part of each day in his office gave him a sufficient interest in the property to have standing. This conclusion would appear to be *a fortiori* in our case where the appellant was actually present when the search occurred. See also *Villano* v. *U. S.,* 310 F. 2d 680 (10th Cir. 1962). But see *U. S.* v. *Grosso,* 358 F. 2d 154 (1966), in which the Third Circuit apparently concluded that the rationale of *Jones* should be limited to those cases in which a dilemma is posed because the defendant has been charged with a possessory crime.

to compel respect for the constitutional guaranty [against unreasonable searches and seizures] in the only effective way—by removing the incentive to disregard it." *Elkins* v. *U. S.*, 364 U. S. 206, 217 (1960). The underlying assumption of the rule is that the incentive for conducting illegal searches and seizures will be largely destroyed if prosecutors are barred from using the fruit in a criminal prosecution. And it is argued that if the incentive is reduced, the police will have less reason to violate the individual's right of privacy.[11]

We have already noted that it would be unwise to use this case as a vehicle for resolving all controversy in this broad area. But we recognize that in the interpretation of opinions, some of the most glaring errors have been made by mehcanical and unreflective application of new or old formulations, and neglect of the differences between cases

---

[11] The fact that such deterrence is achieved at a high price—the suppression of relevant evidence—has led some observers to conclude that the exclusionary rule should be selectively applied by imposing rather strict standards for standing. See, e.g., R. Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. U. L. Rev. 471 (1952); Comment, *Standing to Suppress Evidence Obtained by Unconstitutional Search and Seizure*, 55 Mich. L. Rev. 567 (1957). At the other end of the spectrum, however, many commentators have argued that the standing requirement should be liberalized, or even abolished so that all evidence obtained as the result of an unreasonable search and seizure would be excluded in criminal prosecutions. See, Note, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. Chi. L. Rev. 342 (1967); F. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 Ill. L. Rev. 1 (1950); R. Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 319.

Proponents of this latter view argue quite forcefully that since the exclusionary rule seeks to deter illegal conduct by the removal of incentives, its prophylactic effect is diminished whenever the prosecution is allowed to introduce the fruit of an illegal search. California, however, is the only state whose highest court has eliminated the standing requirement. See *People* v. *Martin*, 45 Cal. 2d 755, 290 P. 2d 855 (1955) (Traynor, *J.*). This Court has refused to take such a step. See *U. S.* v. *Bozza*, 365 F. 2d at 223.

leads to unfortunate and unanticipated consequences. Mindful of this, we therefore caution that we have *not* concluded that every shareholder, or employee, or union member has standing to object to the unlawful seizure of his corporation's or union's books and records. And we have *not* held that every officer has standing to require the suppression of such materials. We do decide that the facts presented to us clearly reveal that the admittedly illegal search and seizure were "directed" at appellant, and that his right of privacy was invaded by the unwarranted action of the state officials. In these circumstances we can discern no legitimate reason for denying DeForte standing.[12]

The Court wishes to express its appreciation to assigned counsel, James L. Lekin of Buffalo, New York, for the time and skill which he devoted to this appeal.

Order reversed and case remanded to the District Court for issuance of the writ of habeas corpus.

---

[12] In light of our conclusion, we find it unnecessary to consider appellant's alternate argument that the decision of the Supreme Court in *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385 (1920), also requires us to reverse.

Order of Reversal.

UNITED STATES COURT OF APPEALS,

FOR THE

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of June, one thousand nine hundred and sixty-seven.

Present: HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES ex rel. FRANK DEFORTE,
Relator-Appellant,

v.

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,
Respondent-Appellee,

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for the issuance of the writ of habeas corpus.

A. DANIEL FUSARO,
Clerk.

Petition for Rehearing In Banc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. FRANK DE FORTE,

Petitioner-Appellant,

v.

VINCENT R. MANCUSI, Warden of Attica Prison, Attica, New York,

Respondent-Appellee.

Louis J. Lefkowitz, Attorney General of the State of New York, New York, N. Y., for respondent-appellee.

Petition denied.

S. R. W.

J. J. S.

L R. K.

U. S. C. JJ.

AUG 25 1967

Petition for Rehearing In Banc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. FRANK DE FORTE,

Petitioner-Appellant,

v.

VINCENT R. MANCUSI, Warden of Attica Prison, Attica, New York,

Respondent-Appellee.

Louis J. Lefkowitz, Attorney General of the State of New York, New York, N. Y., for respondent-appellee.

No active circuit judge having requested that a vote be taken on the suggestion that the case be reheard in banc, the same stands denied.

J. EDWARD LUMBARD,
Chief Judge.

25 August 1967.

Judgment.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil 11,812

ORDER

UNITED STATES OF AMERICA ex rel. FRANK DE FORTE,

Relator,

vs.

VINCENT R. MANCUSI, Warden, Attica State Prison,

Respondent.

The above relator having appealed to the United States Court of Appeals for the Second Circuit from the order of this Court filed November 16, 1966, and said appeal having been heard by the United States Court of Appeals for the Second Circuit which, on the 28th day of June, 1967, issued its order reversing the order of the District Court and directing that the action be remanded with instructions that the writ of habeas corpus shall be issued, and said order having been received and filed in the Office of the Clerk of this Court on the 29th day of August, 1967, it is now,

ORDERED, ADJUDGED and DECREED that the order of the United States Court of Appeals for the Second Circuit issued in this matter on the 28th day of June, 1967, and filed in this Court on the 29th day of August, 1967, is hereby made the order of this Court, and it is further

Judgment.

ORDERED, ADJUDGED and DECREED that pending review of the Decision of the United States Court of Appeals for the Second Circuit, relator is immediately enlarged upon his own recognizance from the custody of the New York State Board of Parole. In the event the Decision of the United States Court of Appeals for the Second Circuit is reversed, relator shall be returned to the custody of the New York State Department of Correction for completion of the unexpired portion of his sentence, and it is further

ORDERED, ADJUDGED and DECREED, that in the event the Decision of the Court of Appeals for the Second Circuit is affirmed, or certiorari is denied, or no appeal is taken from the aforesaid Decision within the prescribed time, the relator is discharged unleess the authorities for the State of New York, within a reasonable time, grant the relator a new trial.

JOHN HENDERSON,
United States District Judge.

Dated: September 21, 1967.

Letter of Respondent's Counsel to Hon. Irving R. Kaufman.

SAPERSTON, WILTSE, DUKE, DAY & WILSON
Formerly Saperston, McNaughtan & Saperston
Attorneys at Law
Liberty Bank Building
Buffalo, N. Y. 14202

June 8, 1967

Hon. Irving R. Kaufman
United States Court of Appeals
Second Circuit
United States Court House
Foley Square
New York, New York

Re: U. S. ex rel. DeForte v. Mancusi, Warden
Docket No. 31112, Cal. No. 478

Dear Judge Kaufman:

During the course of oral argument, you requested me to ascertain, to the extent possible without a hearing, the relationship of Frank DeForte to the books and records of Local 266 admitted to be unlawfully seized without a search warrant. Since the date of oral argument on June 1, 1967, Mr. Henry P. DeVine, Assistant District Attorney, and I have conferred extensively as to De Forte's actual preparation and connection with the books and records of Local 266, and we stipulate and agree on the following:

1. The seized books and records for the most part consisted of the union charter; minutes of meetings of Local 266; a bank book of Local 266; slips, check stubs and cancelled checks of Local 266; applications of the officers to join Local 266; applications of prospective members to join Local 266; record books, and mis-

cellaneous papers of Local 266. (pp. 4419-4439 of the Transcript of the Trial, Vol. IX County Court, Nassau County) Examination of the admitted evidence reveals that DeForte was the preparer of much of these same books, records and documents. Some examples are:

a. The checks seized were signed by all three officers of Local 266.

b. DeForte procured applications from various prospective members and processed these applications. For instance, see Exhibit 28 at page 1838 of Transcript; Exhibits 34 and 35 at page 2128 of Transcript; Exhibit 54 at page 2855 of Transcript; Exhibit 61 at page 3045 of Transcript; and Exhibit (?) at page 5547 of Transcript.

c. An application was submitted by DeForte to join Local 266. (page 4420 of Transcript Vol. IX)

2. DeForte made a substantial portion of entries in the check book, records and ledgers of Local 266.

3. DeForte was Vice President of Local 266 at the time of the search and seizure.

4. The seized books and records were kept in the office of Local 266. (pages 4402-4418 of the Transcript of the Trial, Vol. IX, County Court, Nassau County)

5. DeForte was on the premises of Local 266 when the search and seizure occurred and protested the actions of the authorities. (pages 4394, 4410 of the Transcript of the Trial, Vol. IX County Court, Nassau County)

6. DeForte was in possession and/or custody of the books and records when they were seized by the authorities.

7. DeForte spent a considerable amount of time in the office of Local 266.

8. According to the People's brief filed in the New York Supreme Court, Appellate Division, Second Department at page 99, "most of the books and records of Local 266 which were seized were introduced into evidence."

9. Monitors had been placed on the phone of Local 266. Specifically, a conversation between DeForte and Sidney Mishelow, an owner of juke boxes, was monitored from the District Attorney's Office. *People's Brief,* New York Supreme Court, Appellate Division, Second Department, "People v DeGrandis, DeForte and Zundel", at page 24, and referring to the Transcript pages 4328-4334. Furthermore, representatives of the District Attorney's Office made calls to the office of Local 266 which were monitored and recorded. (Page 18 of People's brief, New York Supreme Court, Appellate Division, Second Department, 4307 of Transcript)

10. Local 266 was never indicted or prosecuted.

It is my understanding that Mr. DeVine will respond to my letter in the acquiescence of the foregoing, agreed upon facts by direct communication to the Court.

These facts are more than sufficient to establish DeForte's right to standing under the authority of *Jones v United States,* 362 U. S. 257 (1960) as interpreted by *Henzel* v. *United States,* 296 F. 2d 650 (5th Cir. 1961), and applied in *Henzel and United States v Birrell,* 242 F. Supp. 91 (S.D.N.Y. 1965). The so-called "on the premise" test

established in *Jones* and referred to in *Henzel* is clearly satisfied as DeForte, vice president of Local 266, was legitimately on the premises of Local 266 when the search and seizure occurred, he objected to the actions of the authorities, and he was in possession of the books and records of Local 266 at the time of the search and seizure.

Under the "person aggrieved by an unlawful search and seizure," test, discussed in *Jones, Henzel* and *Birrell* one must have been a "victim of the search and seizure i.e., one against whom the search was directed." Under this test, DeForte equally qualifies for standing and the protection of the 4th Amendment. It is undisputed that De Forte was vice president of Local 266; that he was the preparer of a substantial portion of the books and records seized; that monitors had been placed on the phone of Local 266 to develop information leading to an indictment of DeForte, along with the other officers of the Local, and that in fact, Local 266 was never indicted or prosecuted. In light of these facts, it is unrealistic to say that DeForte was not the victim of the search and seizure, that is, that the search and seizure was not directed at him as well as the other two union officers.

Technical distinctions are no longer valid criteria in assessing the constitutionality of a search and seizure. *Jones* clearly mandated substance over form and *Warden v Harden*, 35 Law Week 4493 May 30, 1967, is the latest affirmance of this doctrine. With this philosophy in mind it seems clear that the court presently possess more than enough facts to render a decision favorable to the petitioner under the authority of *Jones, Henzel,* and *Birrell.* In these latter two decisions, the defendants were not even on the premises when the searches and seizures occurred and yet the courts quickly recognized the necessity, fair-

ness, logic and desirability of granting standing to these defendants to attack the illegal searches and seizures of corporate books and records.

I would be more than willing to assist the Court in any way whatsoever which the Court believes might be helpful.

Respectfully submitted,

for

SAPERSTON, WILTSE, DUKE, DAY & WILSON

JLL:pm
CC: Hon Sterry R. Waterman
Hon. J. Joseph Smith
Henry P. DeVine

Letter of District Attorney, Nassau County, to Hon. Sterry Waterman.

THE OFFICE OF THE DISTRICT ATTORNEY
OF
NASSAU COUNTY
MINEOLA, NEW YORK
Telephone Pioneer 2-1800

June 12, 1967

Hon. Sterry Waterman
Judge
United States Circuit
Court of Appeals
Second Circuit
Federal Court House
Foley Square
New York, New York

Re: United States ex rel DeForte v. Mancusi
Docket No. 31112, Cal. No. 478

Dear Judge Waterman:

Under separate cover a complete copy of the record of the trial has been delivered to the Office of the Clerk, as well as People's Exhibits 99 through 111, consisting of the Union's bank book, deposit slips, check stubs, canceled checks, as well as a number of Union record books and minutes of Union meetings plus the application of De Forte, DeGrandis and Zundel to join Local 266. It will be seen that entries into the Union record books have been made not only by DeForte, but Zundel and DeGrandis as well.

For the reason that DeForte conceded the books and records in question were the books and records of Local 266, he has been denied standing to question their seizure. Had he claimed that some of the books and records were

his personal books and records, then of course, it would be clear that he would have standing to question their seizure and this is so long before the day of Jones (*United States* v. *Lefkowitz* [1932] 285 U. S. 452; *Go-Bart Importing Co.* v. *United States* [1930] 282 U. S. 344).

The emphasis has always been upon the private nature of the papers seized (*Boyd* v. *United States,* 116 U. S. 616; *Amos* v. *United States,* 255 U. S. 313) contrasted with the records of others (*Curcio* v. *United States,* 354 U. S. 118; *Davis* v. *United States,* 328 U. S. 582; *United States* v. *White,* 322 U. S. 694).

Since the argument of the appeal, the matter of *R. Appleton Owen* v. *Robert F. Kennedy* has come to my attention ([1963, U. S.] 11 Led. 2d 18, 84 S. Ct. 12).

It seems that the Attorney General wanted to examine certain Court records in the possession of certain Mississippi Court Clerks or Registrars in relation to an election for a Federal office. Both the District Court and the Circuit Court directed the Clerks and Registrars to make the Court records available. An application was made to Judge Black for a stay which he denied. Hardly more than twelve months after the Jones case Judge Black declared:

> "Our Court has uniformly held that one who is a mere custodian of records cannot invoke the Fourth or Fifth Amendments to resist an order to produce such records. See United States v. White, 322 U. S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542, and cases cited. The motion for stay is accordingly denied."

It would seem that Jones notwithstanding, the rationale of White, supra; Davis, supra; Curcio, supra; and Wilson, supra, has survived.

I had assumed that with Jones it was settled that the essence of the Fourth Amendment was the right of privacy.

Also, that the common law concepts of the right to title, whether one is a guest, invitee, etc., coming down to us from the law of real property, were no longer acceptable standards to determine whether "houses" of defendant had been searched within the meaning of the Fourth if, in the eyes of the law, defendant's property, as distinguished from another, has been seized.

Bennie Joe Hayden's case (The Criminal Law Reporter, Bureau of National Affairs, Inc., Vol. 1, No. 7) would seem to settle for the present that the spirit of the Fourth is indeed the right to privacy; a conclusion not too helpful to DeForte, not only because his home was not invaded within the determination of any prior controlling cases, but for the more important reason that the evidence seized was admittedy the property of Local 266, not the individual officers, or for that matter, Albert Gallo, Joe Gallo, the Cohen brothers or any of the other indicted conspirators who were not officers or employees of Local 266, whether or not they were present by chance in the Union offices when the search and seizure occurred.

The subtle distinction of the common law put to sleep by Jones would hardly justify "kayoing" the legal existence of a corporation or labor union distinct from its officers, stockholders, members or employees where *its* premises and not that of its officers, stockholders, members or employees has been searched and *its* property seized, not that of its officers, stockholders, members or employees so as to provide standing under the Fourth Amendment to one other than the corporation or labor union.

Of course, if defendant, be he an officer, stockholder, member or employee, is charged with a crime the gravamen of which is "possession", be it narcotics (*Jones* v. *United States,* 362 U. S. 257) or liquor (*Connolly* v. *Medalie,* 58 F 2d 629; *United States* v. *Conoscente,* 63 F 2d 811) or union books, the basic injustice of permitting

the government to argue possession for purposes of guilt, then deny it in the case of the search, would cry out for relief. This, we believe, was the nub of the Coffey case (344 F 2d 625).

In Connolly and Conoscente, defendants were denied standing under the Fourth Amendment because they were but a night watchman and a workman. It was unquestioned they had legal right in the premises and were where they had a lawful right to be. Jones, too, was in the apartment of a friend where he had a legal right to be and, as we read the case, it was to correct the injustice of Connolly and Conoscente that Jones was provided with standing.

If the narcotics did not belong to Jones or, for that matter, if the liquor did not belong to Connolly and Conoscente in the eyes of the criminal law, then no problem under the Fourth Amendment would have presented itself. This represents the heart of the District Attorney's position in this case.

I have this date received a letter from counsel for DeFore regarding the Union records and the connection of relator therewith. I believe the statement of fact to be accurate although, of course, I disagree with the legal inferences or conclusions to be drawn therefrom.

Respectfully yours,

WILLIAM CAHN
District Attorney
HENRY P. DEVINE
Assistant District Attorney

c.c. Hon. Irving R. Kaufman
Hon. J. Joseph Smith
James L. Lekin, Esq.

HPD:EKW